UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN LONG, DYLAN RANDALL, ERIC VAUGHN and CHARLES YOO, on behalf of themselves and all others similarly situated,	:	14 Civ. 6233 (HBP)
Plaintiffs,	:	ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENT STIPULATION AND OTHER RELIEF, IN PART
-against-	:	
HSBC USA INC. and HSBC BANK USA, N.A.,	:	
Defendants.	:	

PITMAN, United States Magistrate Judge:

I. Introduction

Plaintiffs bring this action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq., the New York Labor Law Sections 650 et seq. and various California labor laws, including the Industrial Welfare Commission's California Wage Order 4-2001, codified as Cal. Code Regs. tit. 8, § 11040, California Labor Code Sections 201-03, 218.5, 226, 226.7, 510, 512, 1174, 1174.5 and 1194 and the California Business and Professions Code Sections 17200 et seq. By notice of motion dated February 23, 2015, plaintiffs move for (1) the preliminary approval of the parties' settlement stipulation; (2) conditional

certification pursuant to Fed.R.Civ.P. 23(a) and (b)(3) of two sub-classes of persons asserting claims under New York and California labor laws; (3) appointment of Outten & Golden LLP, Fitapelli & Schaffer, LLP, the Lee Litigation Group PLLC and the Shavitz Law Group, P.A. as class counsel; (4) preliminary approval of a proposed notice of class action settlement and a proposed notice of collective action settlement and (5) an order directing the distribution of the proposed notices (Docket Item 22). The parties have consented to my exercising plenary jurisdiction pursuant to 28 U.S.C. § 636(c) (Docket Item 6). For the reasons set forth below, the motion is granted in part and denied in part.

II. Facts

Plaintiffs worked as premium mortgage consultants and retail mortgage consultants, or in substantially similar positions, for HSBC USA Inc. and HSBC Bank USA, N.A. at HSBC branches nationwide (the "Covered Positions") and were classified by defendants as exempt from overtime pay during at least one of the applicable limitations periods (Declaration of Justin M. Swartz in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class

Counsel, and Approval of Plaintiffs' Proposed Notices of Settlement, dated February 23, 2015, (Docket Item 24) ("Swartz Decl.") ¶¶ 13, 23 & Joint Stipulation of Settlement and Release ("Proposed Settlement Agreement") §§ 1.8, 1.10, annexed thereto). The proposed settlement covers three overlapping groups of plaintiffs: (1) all individuals who were employed in the Covered Positions for at least fifteen days between December 12, 2010 and January 31, 2014 ("FLSA Collective"), (2) all individuals who were employed in the Covered Positions for at least fifteen days in the State of New York between December 12, 2007 and January 31, 2014 ("New York Class") and (3) all individuals who were employed in the Covered Positions for at least fifteen days in the State of California between December 12, 2009 and January 31, 2014 ("California Class") (Proposed Settlement Agreement §§ 1.16, 1.17; Swartz Decl. ¶ 29). The first group captures those individuals who have a claim under the FLSA, the second group captures those who have a claim under the NYLL and the third group captures those who have a claim under the California wage laws (Proposed Settlement Agreement §§ 1.16, 1.17; Swartz Decl. ¶ 29).

The proposed settlement provides that defendants will pay a total of $6,982,000 to cover payments to participating class members, attorneys' fees and costs, service awards,

administrative fees and other expenses (Proposed Settlement Agreement § 3.1; Swartz Decl. ¶ 27). Each class member will receive payment based on the number of weeks worked during the relevant time periods, as reflected in defendants' business records (Proposed Settlement Agreement § 3.4(C); Swartz Decl. ¶ 28). Individual awards from the net settlement fund will be allocated to class and collective members proportionately based upon the following point system: (1) four points per week worked to members of the New York Class employed from December 12, 2007 through April 8, 2011; (2) five points per week worked to members of the New York Class employed from April 9, 2011 through January 31, 2014; (3) six points per week worked to members of the California Class and (4) three points per week worked to members of the FLSA Collective who were not employed in New York or California (Proposed Settlement Agreement § 3.4). The points allocated to each class reflect the value of the claims and monetary remedies available under each of the applicable federal and state laws, including liquidated damages (Swartz Decl. ¶ 30). Each class member's points will be divided by the total of all of the class members' points and then the net settlement fund amount will be multiplied by that quotient to calculate the class member's proportionate share (Proposed Settlement Agreement § 3.4). Plaintiffs' counsel estimates that class members who

participate in the settlement will receive an average of $9,100 each (Swartz Decl. ¶ 31).

The settlement agreement also provides that (1) class counsel will seek approval of an award of not more than one-third of the settlement amount ($2,327,333.33) as fees, plus costs and expenses; (2) plaintiffs Steven Long, Dylan Randall and Eric Vaughn, who will attend the fairness hearing, will each seek a service award of $10,000; (3) plaintiff Charles Yoo and early opt-in plaintiffs Ross Bowman, Lou Ann Burgio, Anthony Monetti, Cynthia Nostro and Kevin Petho will each seek a service award of $7,500; (4) $50,000 will be set aside to cover claims administration fees estimated at $19,000 and (5) $15,000 of the $50,000 set aside for the Claims Administrator will be allocated toward a penalty payment pursuant to the California Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2698 et seq., with 75% paid to the California Labor and Workforce Development Agency and 25% returned to the settlement fund for distribution pursuant to the settlement agreement (Proposed Settlement Agreement §§ 3.3(A), 3.2(A), 3.1(D)-(E); Swartz Decl. ¶ 32).[1] Defendants do not oppose this motion (Memorandum of Law

[1]The proposed settlement is lengthy and highly detailed. The summary set forth herein highlights only the major aspects of the agreement.

in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notices of Settlement, dated February 23, 2015, (Docket Item 23) ("Pls. Mem.") at 1).

III. Analysis

A. Preliminary Approval of the Class Settlement

The preliminary determination of fairness "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." In re Traffic Exec. Ass'n Eastern R.Rs., 627 F.2d 631, 634 (2d Cir. 1980). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 117 (2d Cir. 2005), quoting Manual for Complex Litigation, § 30.42 (3rd ed. 1995).

The principal aspects of the settlement were the result of productive pre-litigation discussions by the parties' counsel

over several months; a lengthy mediation session on July 23, 2014 with an experienced JAMS employment mediator, Michael D. Young, and continued negotiations by the parties' counsel for several months thereafter to finalize the agreement (Swartz Decl. ¶¶ 17-21). The parties were represented by capable counsel, all of whom have extensive experience in employment litigation and whose firms are generally regarded as being among the top employment law firms in the District (see Swartz Decl. ¶ 12). Counsel represented their clients diligently and zealously.

In addition to the presumption of fairness that results from the manner in which the settlement was reached, the factors identified in City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974), abrogated on other grounds by Goldberg v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000),[2] to the extent

[2]The Grinnell factors include:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

(continued...)

they are relevant at the preliminary stage, also warrant preliminary approval of the settlement.

1. The Complexity, Expense and Likely Duration of the Litigation

Litigation would likely be lengthy, expensive and require extensive discovery and briefing since the parties would, no doubt, dispute liability, the damages owed and the appropriateness of class certification. In addition, given the magnitude and geographic reach of the case and the amount of money involved, any trial would be fact-intensive and an appeal would probably be taken regardless of the outcome of a trial or dispositive motion.

2. The Stage of the Proceedings and the Amount of Discovery Completed

Although a settlement was reached before this action was commenced, counsel has demonstrated that both sides were well acquainted with the facts. Counsel investigated the merits of potential claims and defenses; interviewed plaintiffs, early opt-in plaintiffs and other former HSBC employees and obtained

[2](...continued)
City of Detroit v. Grinnell Corp., supra, 495 F.2d at 463 (internal citations omitted).

relevant documents, including plaintiffs' pay records and compensation plans (Swartz Decl. ¶¶ 14-16). Counsel engaged in informal discovery, exchanging documents and producing damages calculations (Swartz Decl. ¶¶ 19, 25). Plaintiffs' counsel was also able to interview a "high-level corporate representative" with respect to the duties and compensation of the Covered Positions (Swartz Decl. ¶ 26). Both sides were sufficiently familiar with the facts to make an intelligent decision with regard to the merits of the case.

3. The Risks of Establishing Liability and Damages

"Litigation inherently involves risks," both in establishing liability and damages. In re PaineWebber Ltd. P'ships Litig., 171 F.R.D. 104, 126 (S.D.N.Y. 1997) (Stein, D.J.), aff'd, 117 F.3d 721 (2d Cir. 1997) (per curiam), citing In re Ira Haupt & Co., 304 F. Supp. 917, 934 (S.D.N.Y. 1969) (Motley, D.J.) ("If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome."). Here, the claims and defenses are fact-intensive and present risks, including the potential inability to prove the number of hours worked and amount of unpaid overtime wages; overcoming the potential argument that class certification or a

collective action are not appropriate and the risk that recovery, if any, could take years and would require significant discovery and expense. In addition, plaintiffs would need to present evidence regarding the nature of the responsibilities of the Covered Positions in order to prove that plaintiffs were misclassified and were not subject to the FLSA's outside sales exemption, 29 U.S.C. § 541.100, or other exemptions. Thus, the fourth and fifth Grinnell factors support preliminary approval.

4. The Risks of Maintaining the Class Action through the Trial

The risk of maintaining collective and class certification throughout trial also weighs in favor of preliminary approval. A contested motion for certification would likely require extensive discovery and briefing, and, if granted, could potentially result in an interlocutory appeal pursuant to Fed.R.Civ.P. 23(f) or a motion to decertify by defendants, requiring additional briefing. In addition, here, the class members work in HSBC branches across the country and are subject to different state labor laws, making a showing of similarity more difficult than the typical wage and hour case. "Settlement eliminates the risk, expense, and delay inherent in the litigation process." Sukhnandan v. Royal Health Care of Long

Island LLC, 12 Civ. 4216 (RLE), 2014 WL 3778173 at *7 (S.D.N.Y. July 31, 2014) (Ellis, M.J.).

5. The Ability of the Defendants to Withstand a Greater Judgment

Plaintiffs state that it is unclear whether defendants could withstand a greater judgment (Pls. Mem. at 17). However, given defendants' size and stature in the banking and financial market, there can be little doubt that it could pay a substantially greater judgment. HSBC Bank USA, N.A. is the principal United States banking subsidiary of HSBC USA Inc., whose consolidated financial statements for the year ending December 31, 2014 show an annual net income of $354 million. HSBC USA Inc., Annual Report (Form 10-K) (Feb. 23, 2015). Nevertheless, this fact, by itself, does not render the proposed settlement unfair. In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 178 n.9 (S.D.N.Y. 2000) (Kram, D.J.), aff'd sub nom., D'Amato v. Deutsche Bank, 236 F.3d 78 (2d Cir. 2001); accord Frank v. Eastman Kodak Co., 228 F.R.D. 174, 186 (W.D.N.Y. 2005). At best, this factor is neutral and does not preclude preliminary approval.

6. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation

"'[T]here is a range of reasonableness with respect to a settlement -- a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" Frank v. Eastman Kodak Co., supra, 228 F.R.D. at 186, quoting Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972). The inquiry with respect to this factor is to "see whether the settlement 'falls below the lowest point in the range of reasonableness.'" In re Gache, 164 F.3d 617 (2d Cir. 1998), 1998 WL 646756 at *1 (2d Cir. Apr. 16, 1998) (summary order), quoting Newman v. Stein, supra, 464 F.2d at 693. "Moreover, when a settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor." Massiah v. Health Plan, Inc., No. 11-cv-05669 (BMC), 2012 WL 5874655 at *5 (E.D.N.Y. Nov. 20, 2012) (internal quotation marks and citation omitted).

Here, the $6,982,000 settlement, less attorneys' fees and costs, service awards, claims administration fees and other expenses, appears to fall within the range of reasonableness.

Plaintiffs' counsel notes that each class member's payment will be based upon the number of weeks he or she worked during the relevant time periods and that the approximate payment to each participating class member will average $9,100 (Pls. Mem. at 18; Swartz Decl. ¶ 31). In light of the best possible recovery[3] and the aforementioned risks of litigation, this settlement provides a fair recovery. Thus, the eighth and ninth Grinnell factors weigh in favor of preliminary approval.

8. Summary

Because the majority of the relevant factors demonstrate the reasonableness of the settlement, I find that the proposed settlement warrants preliminary approval.

B. Conditional Certification of the New York and the California Classes

"Before certification is proper for any purpose -- settlement, litigation, or otherwise -- a court must ensure that the requirements of Rule 23(a) and (b) have been met." Denney v. Deutsche Bank AG, 443 F.3d 253, 270 (2d Cir. 2006); accord Cohen

[3]As discussed more fully below, the notice to class members shall be revised in order to explain how a class member's damages would be calculated at trial were the class member to continue litigating his or her claims, informing the class member of his or her best possible recovery.

v. J.P. Morgan Chase & Co., 262 F.R.D. 153, 157-58 (E.D.N.Y. 2009); Bourlas v. Davis Law Assocs., 237 F.R.D. 345, 349 (E.D.N.Y. 2006).

Class certification under Rule 23(a) requires that

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims . . . of the representative parties are typical of the claims . . . of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

If each of these four threshold requirements are met, class certification is appropriate if the action also satisfies one of the three alternative criteria set forth in Rule 23(b). In this case, plaintiffs argue that class certification is proper under Rule 23(b)(3) (Pls. Mem. at 23-25), which provides that a class action may be maintained where:

> the questions of law or fact common to class members predominate over any questions affecting only individual members, and [where] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

The party seeking class certification bears the burden of establishing each of these elements by a "preponderance of the evidence." Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008); see Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997); Fedotov v.

Peter T. Roach & Assocs., P.C., 354 F. Supp. 2d 471, 478 (S.D.N.Y. 2005) (Haight, D.J.). Although the Court of Appeals for the Second Circuit has "directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation," In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 504 (S.D.N.Y. 1996) (Sweet, D.J.), citing Korn v. Franchard Corp., 456 F.2d 1206, 1208-09 (2d Cir. 1972) and Green v. Wolf Corp., 406 F.2d 291, 298, 301 (2d Cir. 1978), class certification should not be granted unless, after a "'rigorous analysis,'" the court is satisfied that Rule 23's requirements have been met. Spagnola v. Chubb Corp., 264 F.R.D. 76, 92 (S.D.N.Y. 2010) (Baer, D.J.), quoting In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 33 (2d Cir. 2006). Doubts concerning the propriety of class certification should be resolved in favor of class certification. See Levitt v. J.P. Morgan Sec., Inc., 710 F.3d 454, 464 (2d Cir. 2013) (on appellate review, less deference is given to decisions denying class certification than to decisions granting certification).

The proposed Rule 23 settlement classes -- the New York Class and the California Class -- meet the requirements for Rule 23 certification.

1. Numerosity

Plaintiffs' counsel estimates that there are approximately 414 Rule 23 class members, 331 in the New York Class and 83 in the California Class (Supplemental Declaration of Justin M. Swartz in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of Settlement Class, Appointment of Plaintiff's Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notices of Settlement, dated September 10, 2015 (Docket Item 28) ¶¶ 4, 5; see also Pls. Mem. at 20; Swartz Decl. ¶ 33). These numbers easily meet the numerosity requirement. Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., 772 F.3d 111, 120 (2d Cir. 2014) ("Numerosity is presumed for classes larger than forty members."); see also Burka v. New York City Transit Auth., 110 F.R.D. 595, 601 (S.D.N.Y. 1986) (Goettel, D.J.) ("[E]ach subclass and its respective representative must independently meet the requirements for maintenance of a class action." (internal quotation marks and citation omitted)).

2. Commonality

Rule 23(a) also requires the existence of questions of law or fact common to the class. The Supreme Court has

emphasized that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" Wal-Mart Stores, Inc. v. Dukes, --- U.S. ---, ---, 131 S. Ct. 2541, 2551 (2011), quoting Gen. Tel Co. v. Falcon, 457 U.S. 147, 157 (1982). "[S]ince '[a]ny competently crafted class complaint literally raises common "questions,"'" the court must assess whether the common questions are capable of "generat[ing] common answers apt to drive the resolution of the litigation." Wal-Mart Stores, Inc. v. Dukes, supra, 131 S. Ct. at 2551 (emphasis in original), quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131-32 (2009). "[P]laintiffs may meet the commonality requirement where the individual circumstances of class members differ, but 'their injuries derive from a unitary course of conduct by a single system.'" Fox v. Cheminova, Inc., 213 F.R.D. 113, 126 (E.D.N.Y. 2003), quoting Marisol A. v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997) (per curiam). "'Even a single common legal or factual question will suffice.'" Jackson v. Bloomberg, L.P., 298 F.R.D. 152, 162 (S.D.N.Y. 2014) (Oetken, D.J.), quoting Freeland v. AT&T Corp., 238 F.R.D. 130, 140 (S.D.N.Y. 2006) (Cote, D.J.).

Plaintiffs claim, and defendants do not dispute, that all class members worked in the Covered Positions and were

subject to the same HSBC policy, misclassifying them as exempt from receiving overtime pay and failing to pay them the mandated overtime wages (Pls. Mem. at 21). This is sufficient to meet the commonality requirement. See Sukhnandan v. Royal Health Care of Long Island LLC, supra, 2014 WL 3778173 at *2 (allegations that, among other things, defendants failed to pay overtime premiums in violation of federal and state law satisfied commonality requirement); Beckman v. KeyBank, N.A., 293 F.R.D. 467, 473 (S.D.N.Y. 2013)(Ellis, M.J.) (commonality requirement met by claims that defendants, among other violations, misclassified plaintiffs as exempt and failed to pay overtime compensation).

3. Typicality

Rule 23(a)'s third requirement, typicality, ensures that "'maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" Marisol A. v. Giuliani, supra, 126 F.3d at 376 (alteration in original), quoting Gen. Tel. Co. v. Falcon, supra, 457 U.S. at 157 n.13. The typicality requirement is satisfied where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." In

re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009) (internal quotation marks and citation omitted); Bolanos v. Norwegian Cruise Lines Ltd., 212 F.R.D. 144, 155 (S.D.N.Y. 2002) (Berman, D.J.).

"The commonality and typicality requirements often 'tend to merge into one another, so that similar considerations animate analysis' of both." Brown v. Kelly, 609 F.3d 467, 475 (2d Cir. 2010), quoting Marisol A. v. Giuliani, supra, 126 F.3d at 376.

Plaintiffs satisfy the typicality requirement of Rule 23(a) because they allege, and defendants do not contest, that they were all employed by defendants' branches to do similar work and were misclassified as exempt and did not receive overtime pay under the same policy (Pl. Mem. at 21-22). This is sufficient to satisfy the typicality requirement.

4. Adequacy

Pursuant to Rule 23(a)'s final requirement, "the named plaintiffs must 'possess the same interest[s] and suffer the same injur[ies] as the class members.'" In re Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249 (2d Cir. 2011) (alterations in original), quoting Amchem Prods., Inc. v. Windsor, supra, 521 U.S. at 625-26. "'Adequacy is two fold: the

proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members.'" In re Literary Works in Elec. Databases Copyright Litig., supra, 654 F.3d at 249, quoting Denney v. Deutsche Bank AG, supra, 443 F.3d at 268.

The named plaintiffs,[4] like the class members of both of the sub-classes, worked for defendants in the Covered Positions and allege they were misclassified and are owed unpaid overtime compensation. In addition, there is no evidence or reason to believe that there is any conflict of interest between the named plaintiffs and the other members of the sub-classes. Accordingly, plaintiffs also satisfy the adequacy requirement.

5. Rule 23(b)(3)'s Requirements

Rule 23(b)(3) requires that a plaintiff seeking to represent a class establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to

[4]Long, Randall and Vaughn worked for defendants in one of the Covered Positions in New York, and Yoo worked for defendants in one of the Covered Positions in California.

other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

a. Predominance

The Court of Appeals explained the predominance requirement of Rule 23(b)(3) in Moore v. PaineWebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002):

> "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997). It is a more demanding criterion than the commonality inquiry under Rule 23(a). Id. at 623-24, 117 S. Ct. 2231. Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof. [In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001)].

See also Myers v. Hertz Corp., 624 F.3d 537, 549 (2d Cir. 2010) ("Economies of time, effort, and expense in fully resolving each plaintiff's claim will only be served, and the predominance requirement satisfied, if the plaintiffs can show that some . . . questions can be answered with respect to the members of the class as a whole through generalized proof and that those common issues are more substantial than individual ones." (internal quotation marks, alterations and citations omitted)); Flores v.

Anjost Corp., 284 F.R.D. 112, 130 (S.D.N.Y. 2012) (McMahon, D.J.).

Plaintiffs' counsel contends that the predominance requirement is satisfied by the common claim that plaintiffs were misclassified as exempt employees and did not receive overtime compensation (Pl. Mem. at 23-24). Defendants do not dispute this contention. The central issue in this litigation is whether plaintiffs were subject to the FLSA's outside sales exemption or other exemptions which would justify defendants' failure to pay them overtime compensation. Defendants do not contend that the duties of the covered positions varied from branch to branch or state to state. Thus, I conclude that predominance is met here. See generally Brown v. Kelly, supra, 609 F.3d at 484 ("[W]here plaintiffs were allegedly aggrieved by a single policy of the defendants, and there is strong commonality of the violation and the harm, this is precisely the type of situation for which the class action device is suited." (internal quotation marks and citation omitted)); Whitehorn v. Wolfgang's Steakhouse, Inc., 275 F.R.D. 193, 200 (S.D.N.Y. 2011) (Sand, D.J.).

b. Superiority

Rule 23(b)(3) also requires plaintiffs to demonstrate that class-wide adjudication is "superior to other available

methods for fairly and efficiently adjudicating the controversy." In making this determination, the court must balance "the advantages of a class action against those of alternative available methods of adjudication." Anwar v. Fairfield Greenwich Ltd., 289 F.R.D. 105, 114 (S.D.N.Y. 2013) (Marrero, D.J.), vacated and remanded on other grounds sub. nom, St. Stephen's Sch. v. PricewaterhouseCoopers Accountants N.V., 570 F. App'x 37 (2d Cir. 2014) (summary order). Rule 23(b)(3) sets forth four non-exhaustive factors relevant to the superiority inquiry: "the class members' interests in individually controlling the prosecution . . . of separate actions," "the extent and nature of any litigation concerning the controversy already begun by . . . class members," "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" and "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3)(A)-(D).

First, litigation by way of a class action is more economically sensible due to plaintiffs' limited financial resources and the relatively modest size of any individual's recovery. A class action is likely the only means by which all plaintiffs can practically adjudicate their state law claims. See Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 373 (S.D.N.Y. 2007) (McMahon, D.J.); McBean v. City of New York, 228

F.R.D. 487, 503 (S.D.N.Y. 2005) (Lynch, then D.J., now Cir. J.). Second, plaintiffs are unaware of any pending litigation by individual class members concerning this controversy (Pl. Mem. at 24-25), and, third, concentrating this litigation in the Southern District of New York is appropriate because many of the individuals were employed in the Covered Positions in this District. Finally, class adjudication as opposed to multiple individual actions, potentially in multiple jurisdictions, will conserve judicial resources and provide a fair and consistent outcome. See Murphy V. LaJaunie, 13 Civ. 6503 (RJS), 2015 WL 4528140 at *7 (S.D.N.Y. July 24, 2015) (Sullivan, D.J.). Thus, the superiority requirement is also met here.

6. Summary

Accordingly, for all the above reasons, I conditionally certify, pursuant to Rule 23(a) and (b)(3), the New York Class consisting of all individuals who were employed for at least fifteen days in Covered Positions in the State of New York from December 12, 2007 through January 31, 2014 and the California Class consisting of all individuals who were employed for at least fifteen days in Covered Positions in the State of California from December 12, 2009 through January 31, 2014.

C. Appointment of Class Counsel

I appoint the firms of Outten & Golden LLP, Fitapelli & Schaffer, LLP, Lee Litigation Group PLLC and Shavitz Law Group, P.A. as class counsel. These firms routinely represent plaintiffs in employment litigation in this District and have appeared in many major FLSA and state labor law cases, including Irizarry v. Catsimatidis, 722 F.3d 99 (2d Cir. 2013), cert. denied, 134 S. Ct. 1516 (2014) (Outten & Golden LLP); Behzadi v. Int'l Creative Mgmt. Partners, LLC, 14 Civ. 4382 (LGS), 2015 WL 4210906 (S.D.N.Y. July 9, 2015) (Outten & Golden LLP); Hamadou v. Hess Corp., 12 Civ. 0250 (JLC), 2015 WL 3824230 (S.D.N.Y. June 18, 2015) (Fitapelli & Shaffer, LLP and Outten & Golden LLP); Aboud v. Charles Schwab & Co., 14 Civ. 2712 (PAC), 2014 WL 5794655 (S.D.N.Y. Nov. 4, 2014) (Outten & Golden LLP and Shavitz Law Group, P.A.); Zeltser v. Merrill Lynch & Co., 13 Civ. 1531 (FM), 2014 WL 4816134 (S.D.N.Y. Sept. 23, 2014) (Outten & Golden LLP and Shavitz Law Group, P.A.); Flores v. One Hanover, LLC, 13 Civ. 5184 (AJP), 2014 WL 2567912 (S.D.N.Y. June 9, 2014) (Fitapelli & Schaffer, LLP); Viafara v. MCIZ Corp., 12 Civ. 7452 (RLE), 2014 WL 1777438 (S.D.N.Y. May 1, 2014) (Lee Litigation Group PLLC); Yuzary v. HSBC Bank USA, N.A., 12 Civ. 3693 (PGG),

2013 WL 5492998 (S.D.N.Y. Oct. 2, 2013) (Fitapelli & Schaffer, LLP, Lee Litigation Group PLLC, Outten & Golden LLP and Shavitz Law Group, P.A.).

Based on the firms' performance before me in this and other cases and their work in other cases in this District, I have no question that they will prosecute the interests of the class vigorously.

D. Adequacy of the Notice

Plaintiffs' counsel seeks approval of two proposed notices -- the Proposed Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing ("Class Notice") (Swartz Decl., Ex. B) and the Proposed Notice of Proposed Settlement of Collective Action and Fairness Hearing ("Collective Notice") (Swartz Decl., Ex. C) -- and contends that they satisfy the Rule 23(c)(2)(B) requirements (Pls. Mem. at 26-27). Plaintiffs' counsel seeks an order directing distribution of both the Class Notice and Collective Notice (Pls. Mem. 26-27).

1. Class Notice

Fed.R.Civ.P. 23(c)(2)(B) provides:

> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including

> individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;
>
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

I have carefully reviewed the Class Notice submitted by plaintiffs (see Swartz Decl., Ex. B) and find the following errors: (1) the initial instructions for excluding oneself from the settlement incorrectly direct notice recipients to Sections 11-14 instead of Sections 12-14;[5] (2) the notice incorrectly states that "payments of $10,000 to each of two of the Representative Plaintiffs and one of the Early Opt-in Plaintiffs, and payments of $7,500 each to one of the Representative Plaintiffs and five of the Early Opt-in Plaintiffs" will be made instead of "payments of $10,000 to each of three of the

[5]This error occurs in the last sentence of the middle row, labeled "Exclude Yourself," of the table on page 2.

Representative Plaintiffs and payments of $7,500 each to one of the Representative Plaintiffs and five of the Early Opt-in Plaintiffs" will be made,[6] (3) the notice incorrectly states that the fairness hearing will take place at "40 Foley Square, New York, New York, in Courtroom __" instead of "500 Pearl Street, New York, New York, in Courtroom 18A,"[7] (4) the notice fails to explain to recipients their rights as members of the FLSA Collective and (5) the notice does not provide sufficient information to enable the class members to assess their alternatives to settlement.

The parties have agreed to send members of the New York Class and the California Class a "Notice of Settlement of Class and Collective Action Lawsuit and Fairness Hearing" (Proposed Settlement Agreement § 2.4(B)); however, the Class Notice does not explain that the class members are also members of the FLSA Collective and that by choosing not to opt out of the class and signing the settlement checks they will eventually receive, they are also opting in to the FLSA Collective (see Proposed Settlement Agreement §§ 2.5(E), 2.10). The Class Notice, however, does explain that by depositing a settlement check,

[6]This error occurs in the last sentence of Section 16 on page 6.

[7]This error occurs in the first sentence of Section 19 on page 7.

class members release any claims under the FLSA (Swartz Decl., Ex. B § 11). In addition, although the Class Notice informs each class member of the total amount he or she will recover (see Swartz Decl., Ex. B § 8), it does not explain how damages would be calculated should the class member choose to litigate his or her individual claims and prevail. A description of how damages would be calculated at trial would better inform the class members of whether their individual settlement awards were reasonable and of their options should they opt out of the settlement and continue to litigate. See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., supra, 396 F.3d at 114 ("[T]he settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." (internal quotation marks and citation omitted)); accord Arbuthnot v. Pierson, 607 F. App'x 73, 73-74 (2d Cir. 2015) (summary order).

Thus, the following revisions are needed before I can approve the Class Notice and order its distribution: (1) the title of the notice should be revised to conform to that agreed upon by the parties, reflecting the settlement of both the class and collective actions (see Proposed Settlement Agreement §§ 1.21, 2.3(A), 2.4(B)); (2) the table on page 2 of the Class Notice should be revised to explain not only how to exclude

oneself from the class action but also how to include oneself in the collective action, (3) Section 3 on page 3 of the Class Notice should also explain why this is a collective action and (4) plaintiffs' counsel should include a section explaining and providing an example of how damages would be calculated for each sub-class should a class member choose to litigate his or her claims individually and prevail on liability. Plaintiffs' counsel should conform the remainder of the Class Notice to reflect that the recipients of that notice are both class and collective members. The revised Class Notice should be submitted for approval within fourteen (14) days of this Order.

2. Collective Notice

Plaintiffs' counsel also seeks approval of the Collective Notice and an Order directing the distribution of the Collective Notice to the members of the FLSA Collective who are not also members of the New York Class or the California class (Pls. Mem. at 26-27; see also Proposed Settlement Agreement § 2.4(C)). The FLSA Collective includes all individuals who were employed in the Covered Positions for at least 15 days during the period from December 12, 2010 through January 13, 2014 (Proposed Settlement Agreement § 1.16).

"Orders authorizing notice are often referred to as orders 'certifying' a collective action, even though the FLSA does not contain a certification requirement." Damassia v. Duane Reade, Inc., 04 Civ. 8819 (GEL), 2006 WL 2853971 at *2 (S.D.N.Y. Oct. 5, 2006) (Lynch, then D.J., now Cir. J.); accord Mok v. 21 Mott St. Rest. Corp., 14 Civ. 8081 (PKC), 2015 WL 3939230 at *1 (S.D.N.Y. June 26, 2015) (Castel, D.J.); Garcia v. Spectrum of Creations Inc., --- F. Supp. 3d ---, ---, 14 Civ. 5298 (AJN)(GWG), 2015 WL 2078222 at *4 (S.D.N.Y. May 4, 2015) (Gorenstein, M.J.). To determine whether to exercise the discretion to facilitate notice to potential plaintiffs, courts in this Circuit typically apply a two step method. Myers v. Hertz Corp., supra, 624 F.3d at 554-55. The first step, often referred to as certifying the collective,

> involves the court making an initial determination to send notice to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred. . . . At the second stage, the district court will, on a fuller record, determine whether a so-called 'collective action' may go forward by determining whether the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs.

Myers v. Hertz Corp., supra, 624 F.3d at 555.

"[T]o warrant certification as a collective action under § 216(b) of the FLSA, the plaintiff must make at least 'a modest factual showing sufficient to demonstrate that [he] and

potential plaintiffs together were victims of a common policy or plan that violated the law.'" Barfield v. N.Y.C. Health & Hosps. Corp., 05 Civ. 6319 (JSR), 2005 WL 3098730 at *1 (S.D.N.Y. Nov. 18, 2005) (Rakoff, D.J.), quoting Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997) (Sotomayor, then D.J., now S. Ct. J.); see also Damassia v. Duane Reade, Inc., supra, 2006 WL 2853971 at *5 ("As emphasized above, the question at this early stage is only whether, applying a 'lenient' standard, the court is satisfied that plaintiffs, through their allegations, affidavits and other evidence, have met their 'minimal' burden of demonstrating entitlement to a 'preliminary' determination that they are similarly, even if not identically, situated with respect to their FLSA claims."). Plaintiffs' counsel claims that the approximately eighty FLSA collective members who were not employed in New York or California were misclassified and denied overtime compensation pursuant to the same policy as members of the New York Class and the California Class (Pls. Mem. at 2, 5). Because the standard for conditional certification as an FLSA collective is less stringent than the standard for certification of a class action pursuant to Rule 23, see Jackson v. Bloomberg, L.P., supra, 298 F.R.D. at 158-59; Avila v. Northport Car Wash, Inc., 774 F. Supp. 2d 450, 454 (E.D.N.Y. 2011); Hoffman v. Sbarro, Inc., supra, 982 F. Supp. at 263, the discussion in

Section III(B), above, is sufficient to demonstrate that conditional certification of the FLSA collective is also warranted.

I have carefully reviewed the Collective Notice submitted by plaintiffs (see Swartz Decl., Ex. C) and but for the following errors, it is sufficient to provide notice to potential plaintiffs in the collective action who are not also members of the New York Class or California Class: (1) the notice refers to "Paragraph 16,"[8] "Paragraph 8"[9] and "Paragraph 14"[10] instead of more accurate references to "Section 16," "Section 8" and "Section 14" and (2) the notice incorrectly states that "payments of $10,000 to each of two of the Representative Plaintiffs and one of the Early Opt-in Plaintiffs, and payments of $7,500 each to one of the Representative Plaintiffs and five of the Early Opt-in Plaintiffs" will be made instead of "payments of $10,000 to each of three of the Representative Plaintiffs and payments of

[8]This error occurs in the last sentence of Section 8 on page 4.

[9]This error occurs in the first sentence of Section 9 on page 4.

[10]This error occurs in the first sentence of Section 10 on page 4.

$7,500 each to one of the Representative Plaintiffs and five of the Early Opt-in Plaintiffs" will be made.[11]

IV. Conclusion

Accordingly, for all the foregoing reasons, it is hereby ORDERED that:

1. For settlement purposes, I conditionally certify the New York Class consisting of all individuals who were employed for at least fifteen days in Covered Positions in the State of New York from December 12, 2007 through January 31, 2014 and the California Class consisting of all individuals who were employed for at least fifteen days in Covered Positions in the State of California from December 12, 2009 through January 31, 2014;

2. For settlement purposes, I certify a collective consisting of all individuals who were employed in the Covered Positions for at least 15 days during the period from December 12, 2010 through January 13, 2014;

[11]This error occurs in the last sentence of Section 13 on page 5.

3. The parties' proposed settlement is preliminarily approved;

4. For purposes of the settlement, I approve Outten & Golden LLP, Fitapelli & Schaffer, LLP, Lee Litigation Group PLLC and Shavitz Law Group, P.A. as Class Counsel for the FLSA collective, the New York Class and the California Class;

5. Within fourteen (14) days after entry of this Order, plaintiffs' counsel shall submit a revised Class Notice correcting the deficiencies identified above. Upon receipt of the revised notice, I shall reconsider plaintiffs' counsel's request for approval of the Class Notice;

6. Except for the corrections noted above, I find that the Collective Notice fully complies with the requirements of federal law;

7. Plaintiffs' counsel proposes to disseminate the Class Notice to all members of the New York Class and California Class by first class mail, in accordance with Section 2.4(B) of the settlement agreement and to disseminate the Collective Notice to all members of the FLSA collective who are not members of the New York Class or California Class by first class mail, in

accordance with Section 2.4(C). I find that this method of disseminating the notices to all class and collective members, subject to the approval of the revised Class Notice, is the best method practicable under the circumstances and meets the requirements of Fed.R.Civ.P. 23;

8. Within ten (10) business days after an Order approving the Class Notice, in accordance with Section 2.4(A) of the settlement agreement, defendants will provide the information described in Section 2.4(A) of the settlement agreement to the Claims Administrator counsel have agreed upon;

9. Within twenty (20) business days after an Order approving the Class Notice, the Claims Administrator shall mail the Class Notice and the Collective Notice in accordance with Sections 2.4(B) and (C) of the settlement agreement, and the Claims Administrator shall take reasonable steps to re-mail any undelivered notices in accordance with Section 2.4(D) of the settlement agreement.

10. Each class member shall have thirty (30) days from the mailing of the notices, which shall be extended in accordance with Section 2.5(B) of the

settlement agreement, to object to the settlement or to exclude him or herself from the settlement pursuant to Sections 2.5(A) and 2.6(A)-(B) of the settlement agreement.

11. I shall conduct a fairness hearing on December 14, 2015 at 10:00 a.m. to address: (a) whether the proposed settlement stipulation should be finally approved as fair, reasonable and adequate as to the class members; (b) class counsel's application for attorneys' fees and costs and (c) plaintiffs' application for service awards.

Dated: New York, New York
September 11, 2015

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

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